STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2003
v	No. 235543 Lapeer Circuit Court
WILLIAM DAVID HARE, Defendant-Appellant.	LC No. 00-006860-FH

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

A jury convicted defendant William David Hare, a third habitual offender,[1] of operating a vehicle under the influence of alcohol (OUIL), third offense.[2] The trial court sentenced Hare to prison for five to ten years. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

On August 14, 1999, shortly before 4:00 a.m., Lapeer County Deputy Sheriff Andy Engster and his partner, Deputy Sheriff Jeff Brooks, were dispatched to I-69 near M-24 in response to a citizen complaint regarding a drunk driver. Engster saw a 1986 blue Renault, which was similar to the vehicle the dispatcher described to him. Engster and Brooks then followed the car for almost a mile and "viewed his [the driver's] erratic driving." As Engster described it:

> The suspect vehicle was weaving using up both lanes of I-69. Went to the right off the roadway onto the paved shoulder, then completely across both lanes and almost into the median, back onto the inside lane which, at that time, I activated the overhead lights to effect a traffic stop.

Brooks gave a similar description:

> Well, once we spotted the suspect vehicle, we followed the suspect vehicle. And as we were following the vehicle, the vehicle drove off the right

[1] MCL 769.11.

[2] MCL 257.625.

> side of the road onto the shoulder and then back across both travel portions of the roadway, off the roadway almost into the median and then back onto the roadway.

When the car stopped, Engster saw that the driver, Hare, was the only occupant. Hare started to get out of the car as Engster approached him, but Engster directed Hare to stay in the car. Hare, however, said that he had to get out of the car, "that he didn't have a driver's license and that he was drunk." Engster "immediately had him place his hands on the hood of the vehicle and patted him down," finding nothing noteworthy on his person.

Engster then "took him behind his vehicle in front of [the] patrol car for a safer location." Hare "was quite noticeably intoxicated. He had a very strong odor of alcohol and seemed to be very confused." Brooks said that Hare was "a little unsteady on his feet." Engster said that Hare also "had all the appearances of an intoxicated person with a flushed face and bloodshot eyes." Hare fumbled with his wallet when Engster asked for his driver's license, and was eventually able to produce a Michigan identification card, not a driver's license. When Engster asked Hare how much he had "had to drink," Hare responded, "'Too much,' and then reportedly said, 'I'm too drunk to drive.'" Brooks heard this exchange between Engster and Hare, and said that Hare "stated that he had too much too [sic] drink to drive and that he wanted us to arrest him and basically pleading with us to arrest him," which Brooks found unusual but not unprecedented. "Without a doubt," Brooks thought Hare was intoxicated.

Engster asked Hare to perform field sobriety tests, which Hare refused. Engster "attempted to perform the nystagmus test" for Hare,

> which checks the subject's muscles in his eyes which are affected by alcohol and I use my ink pen and go back and forth to check the motion of the subject's eyes, the jerkiness, the onset prior 45 degrees out and he [Hare] would not focus on my ink pen.

Engster then placed Hare under arrest, handcuffed him and placed him in the back seat of the patrol car, read him his chemical rights, and asked him to take a breath test. Hare agreed to the breath test.

Meanwhile, as Engster was dealing with Hare, Brooks was inventorying the contents of Hare's car. Brooks saw nothing unusual in the car, but noticed "a case of beer, Busch Light" in the back seat and accessible to Hare when he was in the driver's seat. The case of beer consisted of twenty-four cans, of which eleven were completely empty and a twelfth can was half empty.

Several minutes after the traffic stop, Engster and Brooks drove Hare to the Sheriff's Department, where Engster waited the requisite fifteen minutes before administering the breath test to Hare using the Data Master. During the waiting period, Engster talked to Hare and completed paperwork. Engster did not observe anything unusual about Hare, who did not vomit, regurgitate, smoke a cigarette, burp, or report any medical problems. As Brooks later explained it, if a suspect burps, regurgitates,[3] or vomits during the waiting period

[3] Apparently, Brooks and Engster used the term "regurgitate" to mean something other than expelling stomach contents completely from the body.

restarts for a full fifteen minutes, apparently to ensure proper testing conditions. After the waiting period elapsed without incident, Engster administered the breath test, and obtained a reading of .19, almost twice the legal limit. Hare refused to give a second breath sample, which was usually done to confirm the results, saying that the officers "had enough evidence against him."

Following his arrest, Hare waived his preliminary examination and attorney John Bovill, III, entered an appearance to represent Hare. For reasons not clear from the record, but evidently at Hare's request, Bovill decided to withdraw as Hare's attorney. The trial court appointed attorney Gary L. Davis to represent Hare on April 24, 2000, although it did not approve Bovill's withdrawal until June 8, 2000. After the trial court appointed Davis to represent Hare, Davis pursued Hare's request for a remand for a preliminary examination. The trial court agreed to remand the case to the district court. The district court then held a preliminary examination and, by ordering bindover a second time for Hare, sent the case back to the trial court.

When Hare's case returned to the trial court in Fall 2000, Davis remained as attorney of record for Hare. However, in a letter dated October 29, 2000, Hare informed the clerk of the trial court that he was "not satisfied with the counsel that I currently have." Hare went on to explain in the letter:

> I want to only have the counsel by my side to assist in the event a question comes about, however, I want to represent myself in all future proceedings. I further more [sic] would like to adjourne [sic] this matter to a later date to prepare motions for the Court to consider. Thank you.

Hare attached a motion to this letter, which he entitled a "motion to dismiss appointed counsel" and "motion to proceed in pro per/self representation [sic]."[4] In the motion Hare alleged that Davis had "not diligently defended against the charges lodged against" him and that "the preliminary examination was not conducted to the performance that" he "felt necessary to defeat the charges . . . ." However, Hare again emphasized that he wanted Davis to be available as standby counsel.

The trial court held a hearing on November 13, 2000, to consider Hare's request to proceed in propria persona. At the hearing, Davis informed the trial court that he believed that Hare wanted to represent himself and wanted him (Davis) to remain as stand-by counsel, referring to a letter that Hare had written to him. This prompted the following exchange:

> THE COURT: Mr. Hare, there is a letter that Mr. Davis gave the Court that purports to bear your signature dated October 31, 2000. Is that your letter?
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> THE DEFENDANT: Yes, sir.
>
> THE COURT: You indicate in here you want to represent yourself during the course of the trial but you wish to have an attorney to stand by?

[4] Capitalization altered.

> THE DEFENDANT: Yes, sir. I have a few issues here I'd like to add to that.
>
> THE COURT: Such as?
>
> THE DEFENDANT: That Mr. Davis failed to give me copies of any proceedings or keep me posted up to date of what was happening at any given time.
>
> THE COURT: What else, Mr. Hare?

Hare and the trial court then discussed a number of motions Hare wished to file, to which the trial court responded:

> Again, when do you think you can do all that by? *You are representing yourself*, so at this point in time I am going to indicate that Mr. Davis is no longer representing you in the capacity of representing you if this matter goes to trial but he is available for you if you have any questions or you wish to call him for some advice.[5]

The trial court did not engage in any further discussion of whether Hare was aware of his rights and how he was giving up those rights by representing himself.

A month later, on December 1, 2000, the trial court received a letter from Hare attached to a series of motions that said, "Further more [sic], PLEASE TAKE THIS AS NOTICE, that as of this date [November 24, 2000], I have not received the file/discoveries *and that I am representing myself in PRO PER from this date on*."[6] One of the motions Hare filed was a motion to appoint an expert witness. Hare explained in the motion that the charges pending against him depended on the results of the breath test that had been administered to him, but that he was not a toxicologist, and therefore could not "testify to the use and procedure of the mechanical device, 'Data Master' used in the preliminary Breath test of the Defendant." Hare, who asserted that he was indigent, claimed

> [t]hat there exist two (2) reasons for Appointing an Expert Witness, the first is the obvious, and that the Defendant needs this Expert to overcome any burden in explaining the test procedures, and chemical composure of the Equipment itself. The Second reason is that such testimony and understanding belongs to those who specialize in this area, the Defendant does not, further more [sic], that the "Expert witness" may further the understanding and simplify to this Honorable Court, the same issue above, the operation and procedure and chemical composure of the equipment "Data Master". . . .

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[5] Emphasis added.

[6] Emphasis added.

On January 11, 2001, the trial court held a hearing on the motion to appoint an expert and the other motions Hare filed at the same time. At the beginning of the hearing, the trial court stated for the record that Hare was "representing himself but the Court continues to require Mr. Davis to be in court to assist Mr. Hare for any issues Mr. Hare need assistance on." The trial court did not otherwise review Hare's decision to proceed in propria persona. Turning to the substantive question whether Hare was entitled to have an expert appointed for him at public expense, the trial court denied the motion, explaining:

> The Defendant's motion for an independent expert also fails. Here he claims he requires an expert to overcome any burden he might have in explaining the breathalyzer test procedure and chemical composure of equipment. However, this Court has already appointed the Defendant an experienced criminal attorney who is familiar with both the operation of the breathalyzer and the grounds upon which it may be attacked. Barring some demonstration to the contrary, the Defendant has failed to show a compelling reason why an expert should be appointed. The Court is also relying on [*People v Graham*, 173 Mich App 473; 434 NW2d 165 (1989)] and [*People v Anderson*, 88 Mich App 513; 276 NW2d 924 (1979)], which basically holds that a criminal defendant has no inherent right to conduct an independent scientific investigation with an expert of his choice.

Hare renewed his request for an expert in a supplemental motion and brief filed on January 24, 2001. In the motion and brief, he argued that he required the assistance of a toxicologist to help determine whether his weight and the timing of the breath test may have affected the test results. On January 31, 2001, Hare separately objected in writing to the order the prosecutor had prepared for the trial court, which denied the motion to appoint the expert. Hare objected to the same order a second time on February 20, 2001. For the first time, he presented the trial court with his theory that his medical condition, gastroesophogeal reflux, also known as acid reflux, improperly affected the breath test results. Hare claimed that he needed a toxicologist to explain this to the jury. The trial court, however, never directly addressed the supplemental motion and objections.

Though the trial court conducted a pretrial hearing for the parties on March 12, 2001, it did not revisit Hare's self-representation or request for an expert at that time. Rather, the trial court merely said that "[i]n court we have Mr. Hare, who is representing himself and we have Mr. Davis, who is here simply to assist Mr. Hare since Mr. Hare indicated he wanted to proceed in pro per." When asked whether he was ready to go to trial, Hare simply replied, "Yes, sir."

At the very beginning of the day of trial, before voir dire, the trial court said:

> We have Mr. Hare. Mr. Hare, again I'm going to advise you of your rights to be represented by an attorney. If you cannot afford an attorney, an attorney will be appointed for you at public expense.
>
> The Court has appointed attorney Gary Davis to represent you in the past. You have indicated that you do not want Mr. Davis to represent you, that you would be representing yourself. Is that correct?

MR. DAVIS [sic: HARE]:[7] Yes, sir.

THE COURT: Do you still wish to represent yourself in this matter.

MR. DAVIS [sic: HARE]: At this time I do.

THE COURT: Let the record reflect that Mr. Hare is representing himself. However, present in court, to try to protect Hare's rights – the Court has requested that Mr. Davis be here to assist Mr. Hare. He's not going to try the case, but he is here to assist Mr. Hare. Mr. Davis, is that correct?

MR. DAVIS: That is correct, your Honor.

THE COURT: During this time you have communicated to [Hare] potential plea bargains and communicated with Mr. Hare in a manner to assist him in preparation for this trial. Is that correct?

MR. DAVIS: I have done so. In addition to having done so again this morning, Judge.

THE COURT: Will you acknowledge that, Mr. Hare, that Mr. Davis has attempted to assist you in this matter?

MR. DAVIS [sic: Hare]: Yes. He has attempted to assist me.

For some reason, as the trial court dealt with other matters, Hare evidently changed his mind about representing himself:

MR. DAVIS:[8] Your Honor, I would like to ask the Court to appoint counsel before we proceed to trial.

THE COURT: Mr. Davis, can you represent Mr. Hare during the course of this trial?

MR. DAVIS: I can, your Honor. In view of the circumstances, I will acknowledge for the record that I have not put in as much preparation as I would had I known in advance that I was going to be asked to conduct the trial. However, I am prepared today, with the assistance of Mr. Hare, to do that.

Davis then represented Hare fully in the trial.

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[7] Though the court reporter attributed several responses to Davis, they actually appear to be from Hare.

[8] Whether this actually was Hare or Davis speaking is not clear from the record, which attributes the statement to Davis.

When the parties finally began presenting their evidence to the jury, Engster and Brooks recounted their observations of Hare's wild driving, his apparent intoxication following the traffic stop, and the circumstances surrounding his breath test. They both emphasized that they saw nothing surrounding the breath test that would have invalidated the result. Sergeant William Marshall gave additional background information concerning the Data Master, its maintenance, and its performance. Though he did not administer the breath test to Hare, he did not find anything in the maintenance records for the machine that would have resulted in an invalid reading. Further, Marshall said that though two tests must be offered to a suspect and the second test is recommended to confirm the first test results, a second test is not necessary to make the first test results valid. In other words, if the suspect takes the first test and declines the second test, the officers need not make an additional effort to confirm the first test results. Engster added that though it was appropriate to have two tests to verify accuracy, in his training he was told that a single test was acceptable.

Before presenting the defense, Davis renewed Hare's motion to have an expert appointed. The trial court again denied the motion, saying:

> The Court has looked at this matter in the past and, again, the Court would assist people who are indigent in providing experts that are shown to be necessary, but there has to be a showing of necessity.
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> At this point in time, based upon observations at the time he [Hare] was stopped at approximately 3:58 until the time the test was concluded, there was no indication there was any burping or any complaint of any gastrointestinal problems. The officers weren't informed of that, they weren't told of that. There was no indication whatsoever that that was the condition of Mr. Hare and the Court indicated that the Court certainly is not going to simply provide experts for wild goose chases and the request is considered and denied.

Hare then testified in his own defense. His primary theory was that he was merely depressed and distraught, not intoxicated, when arrested. He blamed his condition on work problems, personal problems, and specifically a "confrontation" he had with his girlfriend, Dawn, over what he perceived to be an improperly close relationship Dawn had with his mother's boyfriend, Doug. Hare said that he had been at Doug's home in Flushing or Flint until approximately 2:00 a.m., though it could have been as late as 3:30 a.m., and had consumed less than a six-pack of beer during the several hours he had spent there. Though he might have been "impaired," making poor decisions, and not "totally sober," Hare said that he had not consumed enough alcohol to have been drunk when he left the home in Doug's car and started driving on I-69 toward Lapeer. Hare admitted that Doug's beer was in the back seat, accessible to him. In fact, though Hare denied drinking the eleven empty cans of beer, Hare said that he had been "[d]rinking while driving down the road." He denied driving erratically, saying that he drove just badly enough to get the officers' attention. When Engster stopped him, Hare said, he "got out and told" Engster that he "had been drinking, had too much to drink." He did this "[t]o get arrested" "[t]o get Doug's car impounded." Hare said that when "I seen the police, it was my opportunity . . . [t]o get arrested, to get Doug's car taken away" because he was "[u]pset with Dawn and Doug." Hare also evidently thought that going to jail would punish Dawn because she depended on him financially and, while incarcerated, he would not be earning any money. Though Engster read his chemical rights to him, Hare said that it was difficult to hear him and he

did not understand his rights; Hare indicated that at the time he said he understood his rights, he would have agreed with almost anything said to him. Hare also did not know that he had a right to have a blood test confirm his alleged sobriety, and in any event lacked the insurance or money to pay for a test. More importantly, he claimed that it was "outrageous" that the breath test results were so high, which is why he declined a second test.

The other part of Hare's defense was his theory that a medical condition or his medication had made his breath test invalid. At the time of the arrest, Hare explained, he was taking antidepressants, which he said "controls mood" and "suppresses pain." When asked if he had been warned not to mix the medication with alcohol, Hare said that he had "been warned before that it [mixing alcohol with the medication] could intensify the effect [of the medication]." Hare said that he had also suffered from gastroesophogeal reflux for some time. Hare explained that this condition "makes stomach contents exam [sic] up into your throat and causes bad heartburn." Hare had been taking two different prescription medications for this condition in August 1999, and did not recall whether he had suffered any reflux around the time of his arrest, though he said that "[d]rinking usually will hide the effect of the pain in your throat, the burning." Additionally, though he did not recall whether anyone had asked him about his medical conditions or medication at the time of the breath test, he was in the habit of giving that information freely if asked. Accordingly, he inferred that if Engster and Brooks lacked the information about his acid reflux and medications, it was because they did not ask him the proper questions. However, though he had smoked cigarettes earlier on the night of his arrest, he did not recall burping, regurgitating, or vomiting that night, and had not smoked within fifteen minutes of his breath test.

Following his conviction, the trial court sentenced Hare to a minimum of five years in prison and a maximum of ten years in prison, explaining:

> The Court has reviewed this matter and it does appear, Mr. Hare, that you have done everything within your power to delay, stall and muddy the water in this particular matter. It's a simple OUIL third. You were, in fact, found guilty of that. You had two prior convictions plus you had prior felony convictions on your record. There is no doubt that when you were operating that vehicle at a .18 that you were intoxicated. You were putting other people's lives at risk. This is not your first OUIL Third, nor, dare I say, will it be your last once you get out.
>
> The Court determines the following sentence is appropriate and proportional for you and the crime that you have committed. . . .

This minimum five-year prison sentence exceeded the range of seven to thirty-four months in prison recommended under the legislative sentencing guidelines.

After appellate counsel was appointed for him, Hare moved for a new trial. He argued that he was entitled to a new trial because the trial court had failed to advise him of his rights when he waived his right to representation. He also contended that he was entitled to a new trial because the trial court had erroneously denied his request for an expert who would have explained how his gastroesophogeal reflux could have altered his breath test results. The trial court denied the motion at the January 14, 2002 hearing, reasoning that

> the record demonstrates that this Court satisfied the requirements that must be met before allowing Defendant to proceed in pro per. . . . The record also reflects the Defendant understood what he was doing and chose to represent himself while fully aware of his alternatives . . . and Defendant had a Court appointed counsel during the trial. Furthermore, the Court had counsel appointed as standby long before Defendant sought his representation at trial. . . .

Further, the trial court saw no "nexus between the facts of the case and need for an expert." Thus, the trial court believed there were no grounds on which to grant the motion for new trial.

II. Self-Representation

A. Standard Of Review

Hare first argues that the trial court erred when it denied his motion for a new trial because the trial court clearly failed to advise him of his rights as required under MCR 6.005 and related case law. Hare failed to raise this issue at trial, and therefore we are obligated to apply the plain error standard for an unpreserved, nonconstitutional error.[9] Hare must demonstrate plain error affecting his substantial rights.[10]

B. Analysis

MCR 6.005(D)[11] provides in relevant part:

> If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
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> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Further, according to *People v Anderson*,[12]

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[9] See *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996).

[10] See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[11] Administrative Order 2001-10, effective January 1, 2004, alters the numbering of the subsections in MCR 6.005 to add a provision governing local plans for appointing counsel for indigent defendants, but does not change MCR 6.005(D) in any way.

[12] *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

> upon a defendant's initial request to proceed pro se, the trial court must determine that (1) the defendant's request is unequivocal, (2) the right has been asserted knowingly, intelligently, and voluntarily by advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.[13]

However, compliance with this standard for the initial waiver of counsel need not be perfect, it must only be substantial.[14]

Once a defendant waives the right to counsel, MCR 6.005(E) imposed an ongoing duty on the trial court to inquire whether the defendant continued to exercise the right to self-representation, stating:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

In *People v Lane*,[15] the Supreme Court explained this court rule:

> MCR 6.005(E) requires only that the record show that the court advised the defendant of the right to an attorney and informed the defendant that an attorney would be appointed for him if the defendant were indigent, and that defendant either waived the right to counsel or requested a lawyer. In most circumstances, these requirements would be adequately met by the judge telling the defendant that in the upcoming proceeding he has the right to an attorney, at public expense if necessary, and asking the defendant whether he wishes to have an attorney or continue to represent himself. If, in the judge's opinion, the defendant no longer clearly understands the options afforded to him, and the disadvantages of each,

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[13] *People v Rice (On Remand)*, 235 Mich App 429, 432-433; 597 NW2d 843 (1999), explaining *Anderson*, *supra* at 367-368.

[14] See *Rice*, *supra* at 433.

[15] *Lane*, *supra* at 137-138.

> the judge should once again engage in the extensive *Anderson* litany before obtaining either a valid waiver or a request for counsel.[16]

Hare contends the trial court violated both the requirements of MCR 6.005(D) and (E).

Clearly, while Hare made multiple and unequivocal requests to represent himself, the trial court failed to comply with MCR 6.005(D) at the November 2000 hearing, when Hare initially waived his right to counsel. For instance, the trial court did not advise Hare of "the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation."[17] At the subsequent hearings, the trial court's comments reveal its assumption that Hare had continued to assert his right to self-representation without any inquiry into Hare's decision. This violated MCR 6.005(E). Only on the day of trial did the trial court properly inform Hare of his right to counsel. On the basis of this record, Hare has demonstrated plain error.

Nevertheless, our inquiry does not end at this point. Rather, Hare must still convince us that these errors affected his substantial rights.[18] To meet this standard, the plain error must be prejudicial, and therefore "seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings."[19] Hare, however, has not explained what prejudice flowed from the standby counsel arrangement in the pretrial phase of the proceedings or the representation he received at trial. At most, he notes that the trial court denied the motions he filed before trial without the benefit of counsel. Still, he does not explain how any of those motions had merit or would have been granted if he had been represented by counsel at the time. Thus, even if the trial court erred in the way it handled Hare's assertion of his right to represent himself, Hare has not demonstrated that this was error requiring reversal.

III. Expert Witness

A. Standard Of Review

Hare contends that the trial court erred when it denied his multiple requests to have an expert witness appointed to testify on his behalf at trial. We review this issue to determine whether the trial court abused its discretion.[20]

B. Analysis

In MCL 775.15, the Legislature provided indigent criminal defendants with a means of securing testimony from "a material witness in his favor within the jurisdiction of the court,

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[16] Footnote omitted.

[17] MCR 6.005(D)(1).

[18] See *Carines*, *supra* at 763-764.

[19] *Id*. at 766, citing with approval *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[20] See *People v Herndon*, 246 Mich App 371, 398; 633 NW2d 376 (2001).

without whose testimony he cannot safely proceed to a trial . . . ." When this material witness is an expert, "a defendant must show a nexus between the facts of the case and the need for [the] expert."[21] This nexus requirement applies even when the prosecutor introduces scientific or medical evidence at trial,[22] such as the results of breath test administered to a defendant suspected of driving while intoxicated.[23]

In this case, Hare hypothesized that his acid reflux condition could have interfered with his breath test results. Brooks and Engster both suggested that proper testing procedures for the Data Master required a fifteen-minute period preceding the test in which the test subject did not engage in behavior or experience symptoms that might interfere with the test results. Some of the symptoms Engster and Brooks described could be considered roughly similar to some of the symptoms that Hare said he suffered from acid reflux. Critically, however, Engster and Brooks did not observe Hare experiencing any of these symptoms during the fifteen-minute period preceding his breath test. Moreover, Hare never said that he had those symptoms at any time preceding the test. In fact, while Hare provided documentation of his acid reflux condition, he never connected the condition to the breath test at all. Accordingly, he failed to establish the requisite nexus between the facts of the case and his need for an expert. Thus, the trial court did not abuse its discretion in denying his request for an expert.

IV. Sentencing

A. Standard Of Review

Hare claims that the trial court failed to acknowledge that it was departing from the sentencing guidelines, failed to articulate substantial and compelling reasons for the departure, imposed this lengthier sentence to punish him for representing himself, and ultimately failed to impose a departure that is proportional to this offense. Although the standard of review for sentencing issues under the legislative sentencing guidelines is far from clear, the Supreme Court's language in *People v Hegwood*[24] suggest that the amount a trial court departs from the guidelines can be reviewed to determine whether the trial court abused its discretion.

B. Analysis

We have no quarrel with the trial court's explanation of the sentence it imposed as "appropriate and proportional." Though imprecise terminology, the trial court was signaling that it found substantial and compelling reasons to impose a minimum sentence longer than recommended under the guidelines. The substantial and compelling reasons were Hare's prior record, his high level of intoxication at the time of arrest, the risk to others who might be encounter him on the road, his pattern of drunk driving recidivism, and his future likelihood of continuing to drive while intoxicated. Indeed, Hare has an extremely long history of

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[21] *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997).

[22] See *id*. at 581.

[23] See *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

[24] *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001).

misdemeanor and felony convictions, with an extraordinary degree of recidivism in the area of driving while intoxicated. He had approximately nine previous alcohol-related convictions, several additional convictions that involved reckless driving or driving with a suspended license. He was arrested for OUIL involving a snowmobile even after he was arrested and charged with the instant offense. The trial court referred directly to this history, as well as the real consequences Hare poses for others who may come into his path while he is intoxicated. To the extent that the trial court has discretion when determining how much to depart above the sentencing guidelines, we see no error in the trial court's conscious determination that the sentenced imposed was "proportional" to this crime and relatively serious offender.

Nor do we think that, contrary to MCL 769.34(3)(a), the trial court used Hare's "appearance in propria persona" to depart upward from the sentencing guidelines. The trial court did its best to accommodate Hare's decisions to assert his rights to counsel and self-representation without ever disparaging his right to do so. The trial court even provided Hare with standby counsel, which the Supreme Court has described as "a matter of grace, but not as a matter of right."[25] The trial court's comments at sentencing criticizing Hare's delaying tactics, when viewed in light of the record, evidently referred to the lengthy process he provoked by moving to remand for a preliminary hearing, as well as the repetitive motions he brought on a number of different grounds, including the delay his own motion to remand caused.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Donald S. Owens

[25] *People v Dennany*, 445 Mich 412, 443; 519 NW2d 128 (1994).